

<b>CHAPTER ONE: HISTORICAL BACKGROUND OF CONSTITUTIONALISM AND THE RULE OF LAW IN BOTSWANA</b>	<b>3</b>
Pre-colonial Botswana and constitutionalism	3
Colonial period, the dual legal system and constitutionalism	4
Post-colonial period and emergence of Botswana modern constitution	6
Dual legal system	7
The process leading to the passage of the constitution in Botswana	9
 <b>CHAPTER TWO: CONSTITUTIONALISM, THE RULE OF LAW AND THE CONSTITUTION</b>	 <b>11</b>
Introduction	11
Definition	12
Functions of a constitution	13
The nature of the constitution	14
Basic principles of the constitution	14
<i>Constitutionalism</i>	15
<i>Rule of Law</i>	15
<i>Democracy and Accountability</i>	16
<i>Separation of Powers and Checks and Balances</i>	16
General characteristics of the constitution	18
Limitation of rights	19
Amendment of the constitution	19
Who are the constitution's authoritative interpreters?	20
What are the basic rules of constitutional interpretation?	21
Presumption of constitutionality	24

<b>CHAPTER THREE: BASIC PRINCIPLES OF THE BOTSWANA GOVERNMENT</b>	<b>26</b>
Introduction	26
The core principles of liberal democracy	26
<i>A constitutional democracy</i>	26
<i>A constitution</i>	26
<i>A judicial system premised on the belief in equality of all individuals</i>	27
<i>Public representatives occupy the positions that they do at the pleasure of the people</i>	27
<i>Peaceful and civil co-existence of the ruling and opposition parties</i>	27
<i>A loyal opposition</i>	27
<i>Political competitors who obey the laws of the country</i>	28
Citizenship	28
Requirements of citizenship	28
Dual citizenship	29
Political parties	29
List of political parties in Botswana	29
The contribution of political parties in building and sustaining democracy	29
The electoral process	30
Media and elections	30
The fruits of self-government	31
<b>CHAPTER FOUR: APPLICATION OF THE BILL OF RIGHTS</b>	<b>33</b>
Introduction	33
The recipients of the rights conferred by Chapter 2 of the Constitution (The Bill of Rights)	34
Vertical and horizontal application of the Bill of Rights	34
Comparative jurisprudence	35
<i>Canada</i>	35
<i>Namibia</i>	36
<i>South Africa</i>	36
Hierarchy of fundamental rights	37
Socio-economic rights	39
<b>PART TWO: THE BILL OF RIGHTS</b>	<b>43</b>
<b>CHAPTER FIVE: THE RIGHT TO LIFE</b>	<b>45</b>
Introduction	45
The death penalty	46
Euthanasia	48
Self-defence	49
Abortion	50

<b>CHAPTER SIX: PERSONAL LIBERTY AND EQUAL PROTECTION OF THE LAW</b>	<b>52</b>
Introduction	53
Provision to secure equal protection of the law	56
<b>CHAPTER SEVEN: PROTECTION FROM SLAVERY AND FORCED LABOUR, INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT</b>	<b>57</b>
Introduction	58
Protection from torture and inhuman or degrading punishment or treatment	59
<b>CHAPTER EIGHT: PROTECTION FROM DEPRIVATION OF PROPERTY AND PRIVACY OF HOME AND OTHER PROPERTY</b>	<b>61</b>
Introduction	62
Aboriginal title	64
Protection of privacy of home and other property	65
<b>CHAPTER NINE: PROTECTION OF FREEDOM OF CONSCIENCE</b>	<b>67</b>
Introduction	68
Elements of freedom of conscience	68
Freedom of religion	68
Doctrine of religious entanglement	71
<b>CHAPTER TEN: FREEDOM OF EXPRESSION</b>	<b>72</b>
Introduction	72
The importance of freedom of expression	73
Freedom of the press	75
<b>CHAPTER ELEVEN: PROTECTION OF FREEDOM OF ASSEMBLY AND ASSOCIATION</b>	<b>77</b>
Introduction	77
Freedom of assembly under international law	78
Freedom of association	79
Collective bargaining	81
<b>CHAPTER TWELVE: PROTECTION OF FREEDOM OF MOVEMENT</b>	<b>83</b>
Introduction	84
The right to be issued with a passport	84
Stop and search operations by the police	85
Restrictions on freedom of movement	85
<b>CHAPTER THIRTEEN: PROTECTION FROM DISCRIMINATION</b>	<b>89</b>
Introduction	90
The nexus between Sections 3 and 15	90
Discrimination on the basis of sex, although not listed, is not permissible	92

Discrimination on the basis of health or HIV status	92
Direct and indirect discrimination	94
Discrimination based on sexual orientation	96

## **PART THREE: THE RIGHT TO VOTE AND THE ELECTORAL PROCESS** 101

### **CHAPTER FOURTEEN: THE RIGHT TO VOTE AND POLITICAL PARTICIPATION** 103

Introduction	103
Franchise	104
Citizenship	105
Age	106
Residence	106
Disqualifications	108
Voter registration	113
The right to participate	115
The qualifications to be a parliamentary candidate	115
<i>Citizenship</i>	115
<i>Age</i>	116
<i>The requirement to speak and read English</i>	116
<i>Disqualifications</i>	117
Qualification for election as president	118
Nomination procedures for parliamentary candidates	120
The right to form a political party	121

### **CHAPTER FIFTEEN: THE CONSTITUTIONAL AND INSTITUTIONAL FRAMEWORK FOR THE SUPERVISION AND CONDUCT OF ELECTIONS** 124

Introduction	124
Delimitation commission	125
Attributes of the election management body	131
<i>Independence</i>	131
<i>Impartiality</i>	131
<i>Transparency</i>	132
<i>Accountability</i>	132
The body in charge of the election should be monitored	133
Various approaches to administering elections	135
<i>Government approach</i>	135
<i>Judicial approach</i>	135
<i>Multiparty approach</i>	136
<i>Expert approach</i>	136
The Independent Electoral Commission	136
Composition and appointment of the Electoral Commission	137
Functions of the Commission	137

<b>CHAPTER SIXTEEN: THE VOTING PROCESS AND ELECTION PETITIONS</b>	<b>143</b>
Introduction	143
The principles of free and fair voting	144
Polling stations and the appointment of staff	144
Preparation for polling	145
<i>Distance</i>	146
<i>Population</i>	146
<i>Terrain</i>	146
Conduct of polling stations	147
Polling agents	147
Polling	148
Foreign voting	149
Prohibitions on polling day	149
<i>Personation</i>	150
<i>Treating</i>	150
<i>Undue influence</i>	150
<i>Bribery</i>	150
Closing of poll	150
The counting process	151
Challenging the results: election petitions	154
<b>PART FOUR: ORGANS OF GOVERNMENT</b>	<b>157</b>
<b>CHAPTER SEVENTEEN: THE EXECUTIVE BRANCH</b>	<b>159</b>
Introduction	159
Election of the president	159
Oath of office	161
Functions of the president	161
Assenting to and signing bills	162
Appointing commissions of inquiry	162
Prerogative of mercy	162
Vacancy in the office of the president	164
Presidential immunity	165
A synopsis of presidential immunity in selected constitutions in other jurisdictions	168
<i>Nigeria</i>	168
<i>Zimbabwe</i>	168
<i>Zambia</i>	169
<i>Tanzania</i>	169
A brief synopsis of the jurisprudence on presidential immunity	170
The vice-presidency	171
Functions of the vice-president	171
The acting president	171

The cabinet	171
Functions of the cabinet	171
Ministerial responsibilities	172
Collective responsibilities of ministers	172

## **CHAPTER EIGHTEEN: THE NATIONAL ASSEMBLY** 173

Introduction	173
The presiding officer of the National Assembly	174
Functions of Parliament	176
Meetings of Parliament	176
Procedures for passing laws	176
Types of bills	176
Stages in the law-making process	177
Parliamentary committees	177
Powers, rights, privileges and immunities of members of the National Assembly	178
(a) <i>Power to order attendance of witnesses</i>	178
(b) <i>Privileges and immunities</i>	178
Judicial review of parliamentary privilege	179
Judicial intervention in the legislative process	181

## **CHAPTER NINETEEN: NTLO YA DIKGOSI (FORMERLY HOUSE OF CHIEFS)** 184

Introduction	184
Composition	184
Designation and selection of members of <i>Ntlo ya Dikgosi</i>	185
Qualifications for members of <i>Ntlo ya Dikgosi</i>	186
Tenure of office of members of <i>Ntlo ya Dikgosi</i>	187
Functions of <i>Ntlo ya Dikgosi</i>	187

## **CHAPTER TWENTY: THE JUDICIARY** 188

Introduction	188
Independence of the judiciary	189
Qualifications for appointment	191
Judicial Service Commission	191
The judicial oath	192
Security of tenure	192
Financial security	193
Limitation of civil liability	193
Judicial precedent	194
The structure of the courts	195
Court of Appeal	195
<i>Jurisdiction</i>	196
High Court	196
Industrial Court	196

Magistrates Courts	196
Customary Courts	197
<i>Jurisdiction</i>	197
Juvenile courts	197
The role of the judiciary in the protection of human rights:	
an overview of the jurisprudential output	197
<i>Constitutional supremacy</i>	197
<i>The right to non-discrimination</i>	197
<i>The right to administrative justice</i>	200
<i>Freedom of movement</i>	201
<i>Freedom of expression</i>	201

## **CHAPTER TWENTY-ONE: SEPARATION OF POWERS, CHECKS AND BALANCES** 203

Introduction	203
An overview of separation of powers in Botswana	204
The three branches of the state wield unequal power	211
Different branches of the state are interdependent	211
There is an overlapping of functions between the legislature and the executive	212
Members of cabinet are also members of the legislature	212
The executive has the power to legislate	212
Parliament may delegate legislative authority to the executive	213
Legislation that is in conflict with the constitution may be declared invalid	213
The responsibility for the day to day administration of the country	213
Relationship between the executive and the judiciary	213
Judicial officers and performance of executive functions	213
Judicial review of executive decision making	214
A member of the judiciary cannot at the same time be a member of the legislature	214
Judicial interference in the law-making process	214
The legislature has the power to limit the power of the courts	214
Separation of powers and the workings of government	214

## **PART FIVE: PUBLIC AFFAIRS AND PUBLIC OFFICE** 217

## **CHAPTER TWENTY-TWO: PUBLIC FINANCE** 219

Introduction	219
Consolidated Fund	219
Contingencies Fund	221
Public debt	221
Appropriation Act	221
Supplementary estimates	221
Auditor General	222